

1. My name is Gary J. Ball. I am an independent consultant specializing in regulatory matters pertaining to telecommunications. My business address is 47 Peaceable St., Ridgefield, Ct. 06877. In conjunction with QSI Consulting, I was involved in the preparation of the QSI Study ("Study"), which describes the level of CLEC deployment for DS1, DS3, and dark fiber facilities in 14 states based upon data gathered and analyzed in the state *Triennial Review Order* ("TRO") proceedings. Previous to compiling the Study, I personally evaluated the CLEC data and provided testimony on application of the *TRO* criteria in 18 states in the BellSouth and SBC territories.
2. Purpose of Declaration. The purpose of this declaration is to respond to the allegations of several incumbent local exchange carriers ("ILECs") regarding the Study. Specifically, I am responding to the Joint Declaration of Scott. J. Alexander and Rebecca L. Sparks on Behalf of SBC Communications, Inc. ("SBC"), the Reply Affidavits of Shelley W. Padgett and Aniruddha Banerjee, Ph.D. on Behalf of BellSouth Telecommunications, Inc. ("BellSouth"), the Declaration of Lynn Walker on Behalf of Verizon, and the Declaration of David Teitzel of Qwest. I will refer to these individuals collectively as the "ILECs."
3. Validity of the Underlying Data. The ILECs' first line of attack is to attempt to raise doubts about the validity of the underlying data used in the Study and to create an impression that certain key data were inappropriately removed. For example, SBC implies that the Study must be flawed because it does not show a high level of competitive deployment in states with major metropolitan areas.¹

But SBC misrepresents the purpose of the Study as well as the impairment

¹ Alexander/Sparks Declaration, ¶¶ 11 – 16.

analysis that was conducted in the state impairment cases pursuant to the *TRO*. In the *TRO*, the Commission recognized that there was CLEC deployment of facilities in major metropolitan areas, but came to the conclusion that this deployment was primarily at the OCn or multiple DS3 level, because only the higher capacity services generated sufficient revenues to offset the significant fixed and sunk costs of deploying loops and transport services. This conclusion led to the FCC's national finding of non-impairment for the OCn and multiple DS3 capacity levels (above 2 DS3s for loops and above 12 DS3s for transport). For lower capacity levels, such as standalone DS1s and DS3s below the capacity limits, the FCC reached the opposite conclusion, *i.e.*, that the CLECs typically cannot deploy facilities to serve locations and routes at the DS1 and DS3 capacity levels because it would not be economically viable to do so.² Therefore, the Commission made a national finding of non-impairment for facilities at or below those capacity levels, because it (1) determined the likelihood of CLEC deployment for those capacity levels to be low and (2) found little evidence of wholesale offerings for high capacity loops and dedicated transport at those levels

² See, e.g., *TRO* n.957 ("We note that at least two competitive LECs have provided evidence that indicates that they self-provide some DS1 capacity loops to certain customer locations. *It is important to note, however, that this evidence of self-provisioning has been possible where that same carrier is already self-provisioning OCn or a 3 DS3 level of loop capacity to that same customer location. Thus, this evidence does not support the ability to self-deploy stand-alone DS1 capacity loops nor does it impact our DS1 impairment finding*") (emphasis added); *id.* n.945 ("*The potential revenue stream associated with a customer commitment for a single DS3 loop is far less than the revenue stream associated with an OCn loop, yet the cost to construct the loop facility is the same. At the smallest OCn level, i.e., OC3, there are 2,016 voice-grade equivalent lines. A single DS3 is equivalent to 672 voice-grade equivalent lines. A simple comparison of the relative voice-grade equivalent lines demonstrates that a customer commitment in terms of potential revenue stream for a DS3 is many times smaller than that of an OC3 loop. Accordingly, it takes a longer period of time for a competitive LEC to recover its costs of deploying a single DS3 loop facility*") (emphasis added).

as well, even from CLECs that had deployed OCn facilities.³ Based upon the Commission's own analysis, then, the expectation from the state impairment proceedings should have been that there are only a small number of buildings and routes that have overcome the national finding of impairment at the capacity levels established in the *TRO* -- which is exactly what the Study found.

4. SBC Claim of Factual Errors and Omissions. SBC makes a broad claim early in its declaration that the QSI Study "suffers from numerous and substantial specific factual errors and omissions".⁴ SBC fails, however, to actually identify even a *single* factual error in the Study, let alone "numerous and substantial specific" errors. This is not surprising, as the database compiled to prepare the Study is comprised of *exactly the same* buildings and routes that the ILECs themselves proposed in the state proceedings. The buildings and routes the Study reviewed were either taken from the direct testimony of Sparks and Alexander (for SBC states) or from the direct testimonies of witness Padgett (for BellSouth states). The filters that were applied to the data were consistent with those subject to extensive review and cross-examination in the state proceedings. The ALJ's recommended decision in Michigan and the report of the California PUC Staff confirm that the filters applied in the Study were valid and reasonable.⁵
- Moreover, the data used for New York -- perhaps the state with the most

³ *TRO* ¶ 325 ("The record contains little evidence of competitive LECs' ability to self-deploy single DS1 capacity loops and scant evidence of wholesale alternatives for serving customers at the DS1 level"), *id.* ¶ 321 (finding only a "small but *potentially* growing wholesale alternative DS3 loop market") (emphasis added).

⁴ Alexander/Sparks Declaration, ¶ 11.

⁵ Michigan PSC Case U-13796, Proposal for Decision Issued May, 10, 2004; Comments of the California Public Service Commission, Staff Report on Investigation Concerning Competitive Local Carriers' Deployment of Facilities ("California PUC Staff Report").

competitive facilities in the nation – were taken directly from the published report of the New York State Commission staff, with no alterations.⁶

5. Completeness of Data Collection Process. The ILECs complain that the data collection process in the states was incomplete.⁷ This is not the case for the 14 states identified in the Study. As described in the Study, the state data collection process was complete in 13 of the 14 states used, and most states relied upon detailed commission-generated questionnaires to collect data. Every major CLEC provided detailed listings of the buildings and routes to which they have deployed facilities at the identified capacity levels in each of those states, along with listings of collocation arrangements. In many instances, CLECs also provided network diagrams, listings of fiber rings, service agreements, and even business plans. Many CLECs, such as AT&T, TDS Metrocom, and Allegiance, also filed sworn testimony in which they provided additional descriptions of their network capabilities and rebutted the characterizations proffered by the ILECs. Thus, the state records contained substantial data from the relevant parties. And critically, even if the data collections in the states were not 100% complete, the ILECs offer no evidence at all that inclusion of more data would have led to any material differences in the results.
6. Inclusion of ILEC Data. Despite receiving these voluminous data from competitive carriers, the ILECs continue to complain that the data were not complete – but the main reason for their complaint appears to be that the data in

⁶ Note that the New York Commission's comments in this proceeding, which add 63 self-provisioning DS3 transport routes, generate an immaterial difference in the results for that state, representing a difference of only about 0.2% of the total of 27,000 possible transport routes in New York.

⁷ Alexander/Sparks Declaration, ¶ 35, Padgett Declaration, ¶ 19, Walker Declaration, ¶ 3, Teitzel Declaration.

the states did not support their desire to remove UNEs from a large number of buildings and routes. But I must emphasize for the Commission that *no* building and *no* route proposed by the ILECs was eliminated from the QSI review, nor did QSI omit any CLEC data that was collected in the state proceedings. *Every* building and *every* route that SBC and BellSouth proposed for consideration in the states QSI studied was included and analyzed in the context of the CLECs' own representations of their networks and services as well as the requirements of the *TRO*.

7. ILEC Reliance on Data from GeoResults. One of the approaches BellSouth and SBC employed in the state proceedings, which, in retrospect, artificially inflated the number of buildings they identified as potential trigger candidates, was to use data from a third party source called GeoResults. This source relies upon locations of *customer premise equipment* to estimate where competitive facilities may be. Based upon a review of the results provided by GeoResults, it proved to be an unreliable means of identifying CLEC-owned fiber facilities. But even if GeoResults' data were totally reliable, they do not (and cannot) identify the type of services or the capacity levels being provided by the fiber optic equipment in question. Based upon a detailed review of the GeoResults output provided in Florida and Michigan, it became clear that GeoResults-produced data were not useful for the purpose of identifying CLEC fiber facilities. GeoResults identified many companies as "facilities-based CLECs" that were obviously resellers, paging companies, and wireless providers. Additionally, GeoResults identified numerous companies that were not even telecommunications providers. In

Florida, for example, GeoResults listed the following as “facilities-based CLECs”: Federal Express, Enron Broadband, Cendant Membership Services, Fort Smith Beepers, Hamilton County, Savers Federal Savings and Loan, The Basico Group, and The Fashion Station. Clearly, if GeoResults could not distinguish a telecommunications provider from a bank or a clothing store, it cannot be relied upon as a valid source to determine whether CLECs are impaired and need access to UNEs in order to provide competitive services.

8. SBC’s Treatment of GeoResults. SBC’s initial filings in the Illinois and Michigan *TRO* proceedings relied heavily upon GeoResults as a means of identifying CLEC buildings served by competitive facilities. In Michigan, SBC made a filing shortly before the hearing in which it *reduced* the number of buildings for which it was seeking a finding of non-impairment from 66 to 42 – a 36% decrease in the number of “trigger” buildings.⁸ SBC’s *sole* basis for the reduction was to eliminate buildings for which it had relied upon GeoResults information. In subsequent state proceedings for Indiana and Texas, SBC completely *discontinued* its reliance upon GeoResults as a data source for *any* buildings and instead relied solely upon CLEC discovery responses, which is what QSI did in preparing its Study.

9. QSI’s Application of Filters. The ILECs’ use the application of the filters in the Study as an opportunity to rehash their flawed interpretations of the Commission’s findings in the *TRO*. As explained below, the filters QSI applied were clear and consistent with the principles articulated in the *TRO*. Thus, the ILECs’ criticisms of the QSI Study are in fact critiques of the *TRO*, not the facts

⁸ Michigan PSC Case No. U-13796, Response Testimony of Scott Alexander, March 5, 2004.

presented in the study itself. And regardless of the *legal theories* that parties have argued over in this proceeding, the data collected in the state proceedings clearly demonstrate that there is virtually *no* competitive self-deployment or wholesaling at or below the capacity limits established in the *TRO*. It is against that background of facts that the Commission must make its decisions here.

10. Capacity-based filters. The ILECs' arguments here continue their dogged insistence that OCn level facilities should be counted in evaluating impairment for lower capacity DS3 and DS1 services,⁹ effectively rendering the capacity-based distinctions meaningless. QSI's application of a filter in the Study to eliminate facilities serving *more than* the capacity limits (i.e., facilities with more capacity than may be purchased as UNEs) was necessary to distinguish the locations and routes for which the FCC made its national finding of non-impairment (OCn) from those for which it did not (DS1, DS3, dark fiber.) As described above, the entire premise of the economic impairment analysis of the *TRO* was a finding that the revenues associated with the lower capacity levels would be insufficient to justify a competitor's construction of facilities simply to provide standalone DS1 services or DS3 services at or below the capacity limits. The Commission clearly understood – and rejected -- the ILECs' principal argument here, *i.e.*, that OCn level circuits could be “channelized.” For example, the Wholesale trigger was developed on the assumption that DS3 and DS1 loops could be derived from spare capacity from existing OCn locations.¹⁰ Thus, the ILECs' “revelation” that OCn services can be channelized was already considered in the development of

⁹ Sparks/Alexander at ¶¶ 40, 56, Padgett at ¶ 28, Walker at ¶ 27.

¹⁰ *TRO* n.985; *see also TRO* n.957 (quoted in n.2 above).

the capacity limits, and was not the relevant question that was being asked in the state proceedings.¹¹

11. SBC and Capacity-based Filters. SBC also falsely claims that, for high capacity loops, QSI automatically filtered from the list the facilities of a CLEC that was silent as to the quantity of loops it provided.¹² This is not true. The QSI Study left *on* the list all CLECs that indicated they provided loops to a specific location but did not provide the capacity of their facilities, even though, as the *TRO* correctly assumed, those facilities were most likely deployed at an OCn level.

12. Definition of a Transport Route: Another theme that the ILECs continue is their insistence that CLECs that have in fact *not* provisioned dedicated transport between two ILEC wire centers are “operationally ready” to do so.¹³ However, the application of a filter in the Study to remove CLEC that do not even have *connections* in place that would allow them to provision dedicated transport route between two specific ILEC wire centers was both logical and necessary.¹⁴ What became clear during the state proceedings was that numerous CLECs had provisioned collocation arrangements for the *sole purpose* of aggregating ILEC loops from numerous ILEC offices at a single point and connecting them back to a centralized switching location or packet transport network for DSL purposes. I understand that significant testimony on these matters has been offered by many CLECs in this proceeding, and I will not address them further. However, it is

¹¹ See also California Staff Report at 104, recognizing that the Commission rejected channelization arguments in the *TRO*.

¹² Sparks/Alexander at ¶ 56.

¹³ Sparks/Alexander at ¶ 42, Padgett at ¶ 25.

¹⁴ See *TRO* ¶ 401 (to count toward a trigger, a carrier “must offer service” on a specific transport route). If a carrier is *not even connected* at the two ILEC offices at the ends of a route, it cannot be presently offering service on such a route on either a retail or wholesale basis.

evident that such situations do not reflect that a carrier has either “self-provisioned” service on a route or that it is making wholesale service generally available on that route.

13. Identification of Wholesale Providers. The identification of meaningful wholesale alternatives to UNEs is a key issue in determining whether impairment exists at a given building or route. In addition to requiring that a CLEC is actually “offering” wholesale services, the *TRO* also adopted a series of reasonable requirements to provide certainty that a proposed wholesaler is actually able to provide wholesale services in a nondiscriminatory manner to other carriers. Otherwise, competitive carriers could lose access to UNEs on the basis of only a phantom possibility of a wholesale alternative. Therefore, in conducting the Study, QSI removed CLECs that the ILECs claimed were wholesalers but swore under oath that they were *not* wholesalers of high capacity loops or dedicated transport between ILEC wire centers. This was necessary to be sure that QSI only identified those locations and routes for which CLECs truly have a wholesale alternative, so that they could continue to provide competitive service if a UNE were removed. In fact, the issues that arose regarding wholesaling in the state cases arose from the fact that the ILECs insisted that practically any CLEC should be counted as a wholesaler -- *even if the CLEC denied offering wholesale services under oath in sworn discovery responses and had not implemented the necessary network and operational arrangements to provide service to wholesalers.* This approach led the ILECs to attempt to include as wholesalers of high capacity loop or transport UNE alternatives

carriers that stated on their websites that they may offer wholesale *services* -- but not standalone UNEs --- in some locations . The ILECs' approach was not adopted in the Study, because it would have the effect of falsely showing wholesale alternatives for services where none actually exist. The validity of this approach was demonstrated by the independent assessments in the Michigan ALJ's Recommended Decision (which found no loop or transport wholesale trigger was met on any route), the California PUC Staff Report (same) and the New York State Public Service Commission's comments (citing NYDPS Staff Report finding transport wholesaling on less than 0.2% of possible routes in New York).

14. Building Access. One of the biggest obstacles CLECs face when attempting to extend loops to customer premises is gaining access to buildings. Building owners historically have forced CLECs into onerous terms and conditions, and in some cases have refused to allow additional CLECs entry into their buildings. Additionally, CLECs also may only be given partial access to a building to serve a specific customer. The Commission recognized these limitations in the *TRO*, and reasonably required that loop wholesalers must have access to all customer locations in an entire building in order to be "counted" towards the wholesale loop trigger. Thus, the application of a filter to only retain buildings for which CLECs can reach all customers is consistent with the *TRO* and also is necessary to maintain CLECs' ability to provide competitive services. In their comments, the ILECs discount the importance of building access as a significant impediment to CLEC facilities deployment. They also misrepresent the positions that were taken

by the CLECs in the state proceedings.¹⁵ For example, Padgett implies that the CLECs took the position that the triggers could only be met if the same customer within a building was being served by two different competitors.¹⁶ This nonsensical approach was not utilized in the Study, nor was it utilized by the CLECs participating in the *TRO* proceedings. In all events, as stated in the Study, application of this filter in connection with the self-provisioning trigger had only a nominal impact on the results, and in many states had no impact whatsoever.¹⁷

15. Wisconsin Evidence. Finally, SBC criticizes the Study because it did not include 16 routes in Wisconsin under the wholesale trigger. The circumstances of the Wisconsin data were unique, in that a certain CLEC had *denied* being a wholesaler in its data responses to the Commission data requests. The evening before the hearing, the same CLEC *reversed* itself, providing an updated data response stating that it actually was a wholesale provider. Upon questioning from SBC's attorney during the hearing, I was presented with this set of conflicting data, and my response was that, if the CLEC actually were a wholesaler, then it should count, but, since the data were unclear, it should not count until verified. The hearing was then suspended after the D.C. Circuit issued its decision in *USTA II*, so the matter was not ultimately resolved. I would note, however, that the only other state in which there was a similar occurrence was Michigan, where the ALJ ruled that the CLEC should not be counted as a wholesaler pending further evaluation. In all events, I note that the exclusion of 16 routes in an entire state is

¹⁵ Sparks/Alexander beginning at ¶ 60, Padgett at ¶ 24, Banerjee at ¶ 78.

¹⁶ Padgett at ¶ 24.

¹⁷ QSI Study, n. 8.

Rebuttal Declaration of Gary J. Ball/QSI Consulting
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a trivial deviation and does not materially affect the bottom-line conclusion that there is virtually no wholesaling of loops or transport at the DS1 or DS3 levels in any of the states QSI analyzed.